ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	***MM Docket No. 96-167***
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	
	)	
	)	

To: The Commission

COMMENTS OF ELYRIA–LORAIN BROADCASTING COMPANY

Respectfully submitted,

ELYRIA-LORAIN BROADCASTING COMPANY

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SUMMARY

Elyria-Lorain Broadcasting Company ("ELBC"), part of a commonly-controlled newspaper-radio broadcast combination in the greater Cleveland market, enthusiastically supports a reexamination of the Commission Newspaper-Broadcast Cross-ownership Rules ("NBCO"). However, confining that examination just to the waiver policy presently in effect (which, with respect to permanent waivers, is practically nonexistent), does not address the underlying *defect* of the NBCO rules themselves.

Granting a few more waivers than just two as the Commission did in the previous 20 years will not level the playing field for the radio broadcaster–*or* the local daily newspaper–when faced with increased competition from the cable companies, the telephone companies, new exotic electronic media, and the Internet. The Commission itself has expressed concern about the continuing decline in the number of daily newspapers in this country, and that radio can no longer be considered a significant source of news (*NOI*, ¶11). Yet for twenty years it has adhered to a policy that prohibits newspaper-broadcast ownership in the same market.

ELBC respectfully submits that an examination of the Commission's present waiver policies with respect to newspaper-broadcast crossownership cannot be undertaken without first examining the purposes of the NBCO rules, whether they are necessary to protect the public interest, and, indeed, whether they are, in fact, *counter-productive* to the public interest as well as violative of the First Amendment to the Constitution of the United States. ELBC submits that an analysis of the present Communications environment will demonstrate that the NBCO rules are no longer necessary, and indeed, counterproductive to the Commission's twin goals of diversity and competition. Finally, ELBC submits that continued enforcement of the NBCO rules in their present all-inclusive form, is a violation of the First Amendment.

Should the Commission determine that retention of the NBCO rules in some context may be warranted to maintain diversity and competition, then ELBC recommends that the rules be amended to permit newspaper-radio combinations in all markets except those that would be considered "egregious cases" as discussed herein. However, the vast amount of evidence and an analysis of First Amendment cases in the courts dictates that the rule with respect to radio-newspaper cross ownership, should be eliminated completely, leaving the question of television-newspaper crossownership for another day.

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Comes now ELYRIA-LORAIN BROADCASTING COMPANY ("ELBC"), by Counsel and pursuant to Section 1.415(a) of the Rules (47 CFR §1.415(a)), hereby respectfully submits these Comments in response to the Commission's *Notice of Inquiry*[1] in the above-captioned proceeding. For the reasons presented below, FOE urges the Commission to eliminate the application of the Newspaper-Broadcast Cross-Ownership Rule[2] ("NBCO") to radio broadcasting, or to make it applicable only in *egregious* cases,

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[1]FCC 96-381, released October 1, 1996; 61 F.R. _____ (_____, 1996). (hereafter, "*NOI*")

[2]47 C.F.R. §73.3555(d):

> (d) *Daily newspaper cross-ownership rule.* No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:
>
> (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with §73.183 or §73.186, encompassing the entire community in which such newspaper is published; or
>
> (2) The predicted 1 mV/m contour for an FM Station, computed accordance with §73.313, encompassing the entire community in which such newspaper is published; or
>
> (3) The Grade A contour of a TV station, computed in with §73.684, encompassing the entire community in which such newspaper is published.

i.e., radio markets where fewer than two independent owners of mass media would exist following the combination. In support whereof, the following is shown.

I. STATEMENT OF INTEREST

1. ELBC is an Ohio corporation and licensee of Radio Stations WEOL (AM) and WNWV (FM), Elyria, Ohio, and WKFM (FM), Huron, Ohio. Approximately 84% of the common voting stock of ELBC is owned by Lorain County Printing and Publishing Company, publishers of the Elyria *Chronicle-Telegram*, a daily newspaper serving Elyria, Ohio,[3] which, for the past five years, has been included in the Cleveland PMSA.[4] The two majority shareholders of the publishing company sit on the board of directors of the broadcasting company. Apart from this participation, the newspaper company and broadcasting company share no staff and no facilities. News gathering and reporting staffs and facilities of the two companies are completely separate and do not interact. Nor is there a joint sales staff. The two companies have historically been operated completely separately.

2. As a grandfathered newspaper-radio combination, ELBC thus has a direct interest in the outcome of this proceeding, and supports the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on

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[3]The newspaper-broadcast combination is a "grandfathered" facility, having been in existence prior to 1975. Since Elyria's proximity to the Cleveland market assures a plethora of independent voices available to the populace, it was not deemed by the Commission in 1975 to have been an "egregious" case requiring mandatory divestiture.

[4]The community of Elyria receives a plethora of other radio and television signals from Lorain, Ohio and Cleveland, Ohio. The Elyria *Chronicle-Telegram* (circulation 30,522) faces direct competition from the Lorain *Journal* (circulation 35,148), a daily newspaper serving the adjacent community of Lorain, Ohio. The Journal has newsgathering and sales offices in Elyria. In addition, the Cleveland *Plain Dealer* has significant circulation in Elyria, and has established sales offices in that community. SOURCE: Audit Bureau of Circulation, Circulation figures for Lorain County, March 31, 1996.

the ownership and control of electronic Communications entities, which inhibit the full and robust exercise of freedom of expression by these entities.

3. More specifically, in response to the Commission's *NOI*, ELBC believes the Commission's Newspaper-Broadcast Cross-Ownership Rule should be eliminated in its entirety or its waiver policies *substantially* relaxed to permit joint ownership, joint operating agreements, or other joint ventures of commercial radio stations and publishers of daily newspaper in all but the smallest markets in order to take advantage of economies of scale in the marketplace.

4. ELBC respectfully submits that continued enforcement of the NBCO rule no longer serves the stated public interest goals of promoting competition and diversity, is counterproductive to effective competition among media, and places significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

II. BACKGROUND

A. BASES FOR ADOPTION OF THE NBCO RULES

5. A short summary of the historical background surrounding the adoption and enforcement of the NBCO Rules may be helpful: The NBCO Rules were first proposed by the FCC in 1968, as a result of some pressure, on the part of Congress and the Department of Justice, to codify a general proscriptive rule. Up until that time, the Commission had been proceeding on a case-by-case basis in determining whether a proposed newspaper-broadcast combination would constitute an undue concentration of media control in a particular market. The case-by-case method favored the proposed combinations in most instances.

6. While originally proposing the complete breakup of newspaper-broadcast combinations over a five-year period, the FCC, adopted a policy which

proscribed future newspaper-broadcast combinations, but "grandfathered" all but a handful of "egregious cases," the owners of such co-located properties being ordered to divest. (*Second Report and Order* Docket 18110, released 1/31/75). Part of the reason for the Commission's altered position had been the statistical evidence, submitted during the proceeding that newspaper-owned stations actually produced a larger percentage of news, public affairs, and other public service programming than did independently owned stations. In addition, the Commission also expressed the fear that a complete breakup would cause such instability in the industry as to *dis*serve the public interest, convenience and necessity.

7. On appeal, however, The D.C. Circuit reversed that portion of the rules which grandfathered existing combinations, and ordered the FCC to adopt a rule requiring divestiture of all such combinations.[5] Given the primary goal of the FCC to promote *diversity of thought and opinion* in its broadcast licensing decisions, the Court said that considerations such as industry stability and a past history of public service, were entitled to little weight, and that the Commission was compelled to announce a *presumption*, as a matter of law, that co-located newspaper-broadcast facilities do not serve the public interest.[6]

8. The U.S. Supreme Court reversed the D.C. Circuit decision. While it upheld the constitutionality of the NBCO Policy, it agreed with the FCC that full-scale divestiture was unnecessary. The Court said that industry stability and public service were legitimate public interest goals which the FCC was entitled to take into account, and that the decision to make the NBCO Rules prospective in application

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[5] *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

[6] *Id.*

only was permissible as a reasonable agency response to changed circumstances in the broadcasting industry.[7]

9. Most of the grandfathered combinations, however, continue to operate today. Despite the relative stability of the existing newspaper-broadcast combinations since 1975, the face of the media marketplace today has changed beyond all recognition. The lack of diversity which Congress, the DOJ, and the FCC were lamenting in the 1970's, has turned into an uncontrolled explosion of electronic media choices that brings with it new problems in economic stability and spectrum management. Market domination, however, is not one of them. In 1985 the Commission announced that its goal of media diversity had been essentially achieved in all markets, and that heavy-handed government intervention in the form of content, and even arbitrary structural regulations, were no longer necessary, and perhaps, even counterproductive.

B. CONGRESSIONAL PROHIBITION ON RELAXATION OF RULE

10. In the Fall of 1987, a petition for rule making to the FCC was submitted by the Freedom of Expression Foundation, Inc., asking for repeal of the NBCO Rules. Several newspaper-broadcast groups filed comments in support of the petition. Before the Commission could act on the matter, however, Congress, at the instigation of Senators Kennedy and Hollings, passed a rider to the 1988 appropriations bill that proscribed the use of public funds by the FCC to conduct *any* rule making proceedings regarding NBCO, and forbade the FCC from entertaining any waivers, or granting any extensions of temporary waivers of the NBCO Rules.

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[7] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

11. It was no secret that the rider was aimed at Rupert Murdoch, who, through his acquisition of Metromedia, had also acquired ownership of television stations in the New York and Boston markets, in which he also owned daily newspapers. The rider to the appropriations bill passed and President Reagan did not veto the measure.

12. NewsAmerica Publishing, Inc., owned by Murdoch, then sought an extension of the temporary (18 month) waivers it had received earlier. After being turned down by the FCC which cited the Hollings Amendment, NewsAmerica appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and challenged the constitutionality of the Amendment. The Court, while refusing to rule on the validity of the more general prohibition of funding for rule making proceedings, did strike down that part of the amendment which forbade the FCC from granting or extending waivers. The Court, after reviewing the legislative history and post-adoption colloquies on the Senate Floor, ruled that the amendment had targeted Murdoch so specifically and exclusively as to be tantamount of a "bill of attainder," and a violation of the First Amendment and denial of Murdoch's rights to equal protection under the Fifth Amendment.[8] The more general question of whether Congress could keep the FCC from reexamining the NBCO Rules was deemed not yet ripe for review. Murdoch later sold the New York newspaper and the Boston TV Station, so the general issue of the whether the NBCO Rules should be repealed was never addressed after the Court's disposition.[9]

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[8] *NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (1988).

[9] While the controversy involving the Hollings Amendment took place in December, 1987 and early 1988, the FCC only got around to ruling officially on the Foundation's petition (continued...)

C. SUBSEQUENT HISTORY

13. The Congressional ban on the Commission spending appropriated funds "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer..." the NBCO rules continued to be included in federal appropriations bills between 1988 and 1993.[10] In the FCC's 1994 appropriation, however, Congress provided that the Commission could amend its NBCO policies with respect to the grounds for granting permanent waivers thereof.[11]

14. However, it was clear from the House Report that the legislative intent was to limit permanent waivers only to newspaper-radio combinations in the top 25 markets where a minimum of 30 independently owned broadcast "voices" would remain following the acquisition or merger. In addition, the House Report indicated that it expected the Commission to make "a separate affirmative determination that [the proposed combination] is otherwise in the public interest, based upon the applicants' showing that there are specified benefits to the service provided to the public sufficient to offset the reduction in diversity which would result from the waiver."[12] This language was not repeated in the 1995 or 1996

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[9](...continued)
until April of 1991. A letter from the Chief of the Mass Media Bureau of the FCC addressed to Counsel for the Foundation stated that the petition was being dismissed as a result of the Congressional proscription, which had been added to the language of subsequent appropriations authorizations for fiscal years 1989-90, 1990-91 and 1991-91. ELBC at that time did not seek Court review of the Commission's ruling.

[10]*NOI*, ¶6.

[11]*Id. See* 107 Stat. 1167 (1993).

[12]*NOI*, ¶6, citing to H. Rept. 103-293, 103rd Cong., 1st Sess (1993), pp 2-3.

appropriations laws or the accompanying conference reports, and the Commission regards itself as no longer prevented from spending Congressionally authorized funds to reexamine its NBCO policies.[13]

15. On February 8, 1996 President Clinton signed into law the Telecommunications Act of 1996, which contained numerous provisions that will have the effect of completely restructuring the Communications industry. While national and local broadcast ownership rules were modified as a result of the Act, there was no provision for modification of the NBCO policies.[14]

16. The Act *did* authorize, and, in fact *require,* the Commission to review *all* of its ownership rules biennially as part of its regulatory reform review under the newly-amended Section 11 of the Communications Act of 1934. More specifically, the Commission was directed to:

> [D]etermine any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[15]

17. While amended Section 11 permits the Commission to begin such biennial reviews in 1998, the Commission had promised The Walt Disney Company in connection with the Disney–ABC/Capital Cities merger, that it would take up the question of modification of the NBCO policies sooner.[16] The parties in the *ABC/Capital Cities* case had requested a permanent waiver of the NBCO rules to

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[13]*NOI,* ¶7.

[14]An amendment to the House version of the bill that would modify the NBCO rules was voted down by the House. *NOI,* ¶7. 141 Cong. Rec. E-1571 (August 1, 1995).

[15]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §202(h) (1996).

[16]*NOI,* ¶1. *See, Capital Cities/ABC, Inc.,* 11 FCC Rcd 5841 (1996).

permit retention of newspaper-broadcast cross-ownership combinations that would be created by the merger.[17] The instant *NOI* was in fulfillment of that promise.[18]

III. THE NBCO RULES SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED

18. ELBC respectfully submits that an examination of the Commission's present waiver policies with respect to newspaper-broadcast cross ownership cannot be undertaken without first examining the purposes of the NBCO rules, whether they are necessary to protect the public interest, and, indeed, whether they are, in fact, *counterproductive* to the public interest as well as violative of the First Amendment to the Constitution of the United States. ELBC submits that an analysis of the present Communications environment will demonstrate that the NBCO rules are no longer necessary, and indeed, counterproductive to the Commission's twin goals of diversity and competition.

19. ELBC also submits that, whatever constitutional basis existed for such rules twenty years ago, has long since evaporated. That being the case, these rules can no longer withstand constitutional scrutiny, and must be repealed as contrary to the First Amendment. Alternatively, they must be completely revamped to be as narrowly tailored as possible to present the least possible infringement on First Amendment rights.

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[17]The Commission granted temporary waivers with the promise that it would review its NBCO policies in the near future. *Id.*

[18]*NOI*, ¶1.

A. *THE NBCO RULES ARE NO LONGER NEEDED TO ACHIEVE MEDIA DIVERSITY*

20. The Supreme Court upheld the NBCO policy as a "reasonable administrative response to changed circumstances in the broadcasting industry." The Court made reference to the Commission's statement in the *Order* adopting NBCO that at one time, the Commission had actually encouraged co-ownership of newspaper and broadcast facilities because of a shortage of qualified license applicants. However, by 1975, the Commission had concluded that a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, at that time the number of new channels open for new licensing had diminished substantially.

21. Citing to previous decisions where it had upheld the validity of an FCC regulation as against a First Amendment challenge (*e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Storer Broadcasting*, 351 U.S. 192 (1956); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)) the Court dismissed facial challenges to the NBCO Rules filed by several intervenors, including ANPA (now Newspaper Association of America) and NAB. Where a license is denied because to do so would serve the public interest, said the Court, is not a denial of free speech. Finally, the Court distinguished cases cited by the intervenors where it had previously struck down federal laws which imposed conditions on the receipt of a federal benefit tantamount to surrendering First Amendment rights (*e.g., Speiser v. Randall*, 357 U.S. 513 (1958); *Elrod v. Burns*, 427 U.S. 347 (1976)) by suggesting that the regulations in question in those cases directly abridged freedom of expression since a denial was based solely on content; here, the regulations were

not content-related, said the Court, and their purpose and effect is to promote free speech not to restrict it.

22. From a public policy perspective, a significant basis for overturning the regulatory constraints against newspaper-broadcast cross ownership is that *changed circumstances* warrant their elimination. Since "changed circumstances" was the basis for the Supreme Court finding the NBCO Rules reasonable eighteen years ago, the same rationale can be used today to justify their repeal.

23. Ten years after the adoption of the NBCO Rules, it had become clear that changed circumstances had eliminated the need for the rules, and that their continued enforcement was exacerbating the problem of declining newspaper ownership and readership as an alternative media. Between 1975 and 1987, for example, the number of dailies had declined from 1,756 to 1,645–a reduction of 111 newspapers. And, while total circulation of dailies during the same period had increased by approximately 2.2 million, it had declined as a ratio of population growth, from 28.15% to 25.93%.[19]

24. Based upon the data collected *since* 1987, ELBC concludes that the trend is not slowing down, but accelerating. Between 1987 and 1995, for example, 113 more dailies ceased operation, bringing the total down from 1,645 to 1,532. Even more alarming is the fact that general circulation for the first time has actually *decreased* by almost *4.6 million,*[20] having declined every year, in fact, between 1987

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[19]As shown by statistics from subsequent years set forth below,, this increase in circulation was short-lived.

[20]In 1987, total daily (*i.e., morning and evening*) circulation was at an all-time high of 62,826,273. By 1995, total daily newspaper circulation had dwindled to 58,246,672, a loss of 4,579,601. SOURCE: Newspaper Association of America ("NAA"), *Facts About Newspapers,*
(continued...)

and 1995, except for 1991.[21] When one compares this negative trend with the phenomenal growth of the electronic media (which has continued unabated since 1987), a significant case can continue to made–in fact more telling since 1987–that the NBCO Rules are not only no longer necessary but actually may be hastening the demise of the local daily newspaper.

B. CONTINUED ENFORCEMENT OF THE NBCO RULES IS COUNTERPRODUCTIVE.

25. From the above statistics, it may be concluded that continued enforcement of the NBCO Policy is counterproductive to the stated goals of "diversity." The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress enacted the NEWSPAPER PRESERVATION ACT.[22] The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the arrangement, not more than one of the newspaper publications involved in the performance of such an arrangement was likely to remain or become a financially sound publication.[23]

26. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by Congress in the implementation of the NEWSPAPER PRESERVATION ACT as well.[24] ELBC

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[20](...continued)
1996.

[21]*Id.*

[22]PUBLIC LAW 91-353, 15 U.S.C. §1801.

[23]*See* 15 U.S.C. §§1801-1803.

[24]That Congress apparently acted inconsistently with the Act, by prohibiting in its 1987 appropriations bill the FCC from conducting Rule Making proceedings to repeal the NBCO (continued...)

respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

27. Continued enforcement of the NBCO Policy will continue to diminish broadcast program service. In its initial Rule Making adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.[25] That co-located newspaper-broadcast combinations had provided "undramatic but nonetheless statistically significant superior" program service in a number of program particulars was too clear in the record to be denied by the Commission.[26]

28. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a radio broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of

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[24](...continued)
Policy, is explained by the political motivations of the Congressional Leaders at the time. As found by the U.S. Court of Appeals, which overturned a portion of that legislation, debate on the floor clearly indicated that the legislation was directed at a single individual, Rupert Murdoch, owner of Fox Broadcasting and, at that time, daily newspapers in both Boston and New York, which newspapers at times were extremely critical of certain U.S. Senators. Based upon the remarks of some senators during the debate, it was clear that the rider was retaliatory in nature, and an attempt to suppress free speech. *See, NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[25]*See, Newspaper Broadcast Cross Ownership Policy*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

[26]*Id.*

scale through a greater revenue base and considerations of space, consolidation, and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the Newspaper-Broadcast Cross Ownership Policy would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.

C. *CONTINUED ENFORCEMENT OF THE NBCO RULES, AS APPLIED TO RADIO BROADCASTING IS INCONSISTENT WITH THE FIRST AMENDMENT*

29. The ownership regulations that broadcasters must observe were put in place to maximize outlets for local expression and ensure diversification of programming. Unfortunately, the regulations no longer effectuate these policies. Eliminating the stringent ownership rules would allow radio broadcasters to compete more effectively with other media, thereby ensuring quality and diversity in programming for the public. The ownership rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: radio broadcasters are prevented from freely selecting the media to present their programming to the public, and are also denied the ability to bargain for better programming. The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

30. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.[27] In *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445, 2468, 75 RR 2d 609

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[27] *Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977).

(1994), the Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions may operate against only a small group of speakers is irrelevant.[28] The scarcity and diversity rationales do not adequately justify such rules in light of the enormous amount of programming and information available to consumers.

31. From a First Amendment perspective, radio broadcasting can hardly be considered unique when compared to other mass media information sources. The First Amendment would be better served by placing radio broadcasters on equal footing with other information providers.[29] In short, "[T]he public interest in diverse . . . options is best served by deferring to the marketplace."[30]

32. Moreover, it has long been held that regulations that impose First Amendment burdens on speech must be closely tailored to further an important

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[28] *C&P Telephone*, 76 RR 2d at 995.

[29] The incredible explosion of electronic mass media outlets, including Cable TV with audio channels, Direct Audio Radio Services ("DARS"), Direct Broadcast Television Service ("DBS"), MDS, IVDS, electronic billboards compact disks, video games for home computers, telephone dial-up audio programming services, local computer bulletin board services ("BBS"), and the vast reaches of cyberspace *via* the Internet–all new and competing technologies since the adoption of the NBCO Rules in 1975–has placed the information consumer in a position of having too many, not too few, choices to obtain information and other programming. All of these "real time" information sources compete for the attention and dollars of the information consumer, who only has 24 hours in a day to partake of these varied services.

[30] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

government interest.[31] If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in most major markets to realize that these concerns are overstated.

33. For the reasons advanced above, the continued enforcement of the Newspaper-Broadcast Cross-ownership rule no longer serve the public interest and raise serious questions of consistency with First Amendment principles. It is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien, supra.*

34. There can be no dispute over whether NBCO restrictions impinge upon the broadcaster's First Amendment rights. Although the regulation professes to be content neutral, restricting only common ownership of broadcast facilities and daily newspapers in the same market, and not the content of their expression, those regulations discriminate among speakers in the mass media market, based on the nature of the medium used for speech, and are thus highly suspect. It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. The rules dictate where a broadcaster may exercise his freedom of expression, which is contrary to the well established principle that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right – especially the right to freedom of expression. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v.*

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[31] *United States v. O'Brien*, 391 U.S. at 377 (1968).

Verner, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1968).[32] Moreover, given the current availability of programming and other information sources, it cannot be concluded that the present multiple ownership rules are sufficiently narrowly tailored to meet the standards set forth in *United States v. O'Brien, supra*. Certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to promote goals that have already been achieved – diversity of opinion and marketplace competition.

35. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the extent that (a) it furthers an important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, or (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien, supra.*

36. The two primary reasons why the FCC adopted numerical ownership restrictions and the duopoly and one-to-a-market rules were to further the policy of promoting diversity of viewpoints in media markets, and prevent monopolistic practices within the broadcast industry. Both goals were in turn based upon the scarcity rationale, and the need to ensure that all markets were provided with a

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[32]See also, *Buckley v. Valeo,* 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." 424 U.S., at 48-49.

sufficient diversity of viewpoints. Under the circumstances existing when the rules were first promulgated, the rules were justified under the *O'Brien* test set forth above.[33] However, given the fact that the Commission has officially proclaimed that the goal of diversity has been achieved in virtually all media markets, it must follow that restrictions on freedom of expression can no longer be justified by reference to such a goal. It has been observed that scarcity is an inappropriate basis for broadcast regulation of First Amendment speech.[34] Even assuming that scarcity should serve as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.[35] Except, perhaps, for a

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[33]*See also, Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 21 RR 2d 2087 (2d Cir. 1971).

[34]In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." *(footnotes omitted)*

61 RR 2d at 337.

[35]*See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in

(continued...)

handful of "egregious cases," where antitrust considerations *might* warrant some scrutiny of media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given media market. Whatever validity the current NBCO rules may once have had, it no longer exists.

37. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See, Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." [citations omitted]). Accordingly, ELBC submits that the Newspaper-Broadcast Cross-ownership rules that presently restrict common ownership of daily newspapers and commercial radio stations be eliminated.

38. Alternatively, ELBC would recommend that the Commission narrowly tailor its NBCO rules to prohibit newspaper-radio cross-ownership only in "egregious cases," *i.e.*, those radio markets[36] where less than two (2) other independently-owned mass media sources[37] would continue to exist following the acquisition or

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[35](...continued)
broadcast and other media).

[36]The definition of radio market is, obviously, imprecise. ELBC would propose that the Commission adopt the definition that is contained in §73.3555(a) of the Rules pertaining to local radio ownership.

[37]Logic dictates that the counting of other independent "voices" in such a market should not be limited merely to commercial radio stations, but should include commercial *and* non-commercial radio and television stations, cable television systems, MDS licensees, and other
(continued...)

merger. ELBC acknowledges that few, if any markets would have so few outlets, which is simply to acknowledge that the goal of diversity of voices has already been met. To restrain the broadcast media, where other electronic and print media have no such restrictions, is to warp the playing field, giving a competitive advantage to those media. It is time to level that playing field, and to let the market decide which voices will prevail, both economically, and in the hearts and minds of the people.

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[37](...continued)
daily newspapers having significant circulation within the defined market. Since the rule itself speaks to "crossownership" of different media, the calculation of the number of independent voices must include all forms of mass media presently considered as "attributable" under the Commission's multiple ownership and other rules and policies.

CONCLUSION

WHEREFORE, the above premises considered, ELBC respectfully urges the Commission, to amend its ownership rules, REPEALING Section 73.3555(d) with respect to AM and FM radio broadcast stations. ALTERNATIVELY, the rules should be substantially relaxed to apply only to "egregious cases," as set forth above.[38]

Respectfully submitted,

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[38] *See* ¶38 *supra*, and accompanying note.